No. 78-836

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

LEE PHARMACEUTICALS,
Petitioner,

v.

JUANITA M. KREPS, Secretary of Commerce, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY MEMORANDUM FOR THE PETITIONER

RICHARD H. STERN
1801 K Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

LEE PHARMACEUTICALS,

Petitioner,

v.

JUANITA M. KREPS, Secretary of Commerce, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY MEMORANDUM FOR THE PETITIONER

I.

The respondents completely omit discussion of Question 2 (Pet. 2) and Point II (Pet. 12-14) in the Petition, apparently thereby conceding the correctness of petitioner's position as to them. As the Petition points out, in its order denying the motion to vacate (Pet. 1a) the court below refused even to consider exercising its discretion as to petitioner's motion. Instead, the court simply denied that it had any power to act. That decision is contrary to this Court's decisions in *Hill* v. *Hawes*, 320 U.S. 520, 524 (1944); and *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-212 (1952).[1] See also *Providence Rubber*

[1] Respondent incorrectly cites *Minneapolis-Honeywell* for the proposition that entry of a fresh judgment without a material change in its terms cannot extend the time for filing a petition. The opinion in that case expressly states otherwise. 344 U.S. at 211-12.

Co. v. *Goodyear*, 6 Wall. 153 (1868) (referred to in *Minneapolis-Honeywell* as authority on this point). This Court has made it clear that the lower federal courts do have the authority to vacate and reenter their judgments to correct mistakes or errors of the type involved here, when it is appropriate to do so to protect the rights and legitimate expectations of the parties. The Ninth Circuit's order refusing to exercise the court's discretion, on the erroneous theory that it lacked the authority to do so, should be reversed.

Directly contrary to the suggestion of respondents (p. 3), the 1946 amendment of F.R. Civ. P. 77 did *not* "overturn the result in *Hill*" and F.R. Civ. P. 77(d) does *not* "now forbid the type of extension involved here. By its terms the 1946 amendment of Rules 77 and 73, among others, expressly gave the district court the discretionary power to extend the time to take an appeal (former Rule 73(a)), which is what petitioner sought here from the court of appeals, so that instead of "overturning" *Hill* or "forbidding" its result the 1946 amendment codified them. The truncated quotation from the Advisory Committee's note, set out at p. 3 of the Memorandum in Opposition, replaces with asterisks the rest of the last sentence quoted from the note. In the omitted rest of that sentence, the Advisory Committee points out that the clerk's failure to give notice is a consideration that the district court should take into account in determining whether to exercise its discretion under F.R. Civ. P. 73(a) (now F.R. App. P. 4(a)) to extend the time for appeal. See *Advisory Committee Report*, 5 F.R.D. 485, 492 (1946).

II.

The cases on which the respondents rely for the proposition that an untimely-filed petition for review of a properly entered judgment faces a jurisdictional bar (Mem. in

Opp. 12) are quite beside the point. All of these cases involve unquestionably final judgments and no errors of the court below in perfecting the finality of the judgment. Here, by way of contrast, the question is whether the judgment below became "final" for all purposes when, to petitioner's prejudice, the court below violated the Federal Rules of Appellate Procedure. The only apposite cases are *Hill* v. *Hawes*, *supra*, and the other like authorities on which petitioner relies (Pet. 11-13). Respondents merely state (incorrectly) that *Hill* was "overturned" by subsequent authority, and do nothing to counter or refute the reasoning in *Hill* and the other cases, or to distinguish or explain away their clear applicability to the case at bar.

For the reasons stated in the petition and in this memorandum, it is respectfully submitted that the petition for a writ of certiorari should be granted.

RICHARD H. STERN
1801 K Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

December 1978.